

support our proposal,²²⁷ although certain commenters recommend that Commission staff be permitted to determine damages issues on the Accelerated Docket when it appears to be appropriate.²²⁸

92. As we stated above, the staff administering the docket may consider a complaining party's decision to bifurcate its damages claims from the liability portion of its case in determining whether to accept a matter onto the Accelerated Docket.²²⁹ We believe that bifurcation of the issues in this manner generally will aid in the decision of complaint proceedings within the expedited timeframe of the new docket. We agree, however, that parties should have the option at least to request adjudication of their damages issues on the Accelerated Docket.²³⁰ Accordingly, the staff administering the docket will retain the discretion to accept a complaint presenting both liability and damages issues. Additionally, a complainant that has prevailed on the question of liability may request Accelerated Docket treatment for its subsequent damages complaint. We agree with the commenters asserting that damages issues should be resolved as quickly as possible after a finding of liability;²³¹ however, we decline the invitation to set a deadline for the conclusion of the damages phase when the damages phase is not accepted onto the Accelerated Docket.²³²

93. One commenter expresses the concern that injunctive- or declaratory-type relief should not necessarily await the conclusion of the damages phase of an Accelerated Docket proceeding.²³³ On the contrary, the routine bifurcation of proceedings on the new docket will

²²⁷ See Ameritech Comments at 34-35; GTE Comments at 13-14; MCI Comments at 12; RCN Comments at 8; SBC Comments at 18; Sprint Comments at 7; TRA Comments at 15; USTA Comments at 8; WorldCom Comments at 9; CompTel Comments at 7. *But see* ICG Comments at 8 (arguing that cases need not always be bifurcated).

²²⁸ See ALTS Comments at 5; ICG Comments at 8.

²²⁹ See *supra*, ¶ 19; Appendix, Rule 1.730(d)(3). Naturally, although this decision may affect a party's ability to gain admission to the Accelerated Docket, a complainant remains free to bring its damages claims as it chooses.

²³⁰ See MCI Comments at 12. See also ALTS Comments at 5.

²³¹ See, e.g., MCI Comments at 12.

²³² See CompTel Comments at 7 (recommending that damages phase be completed within 60 days of the conclusion of the liability portion).

²³³ See USTA Comments at 8. See also CompTel Comments at 8 ("The Commission clearly has the power to order injunctive relief, whether on a permanent or interim basis.").

not affect the staff's authority to declare a violation of the Act, or a Commission rule or order, when it is presented in a complaint. The *First Report & Order* discusses certain instances in which the Commission may grant injunctive relief.²³⁴ In Accelerated Docket proceedings, the staff will have the Commission's full delegated authority to declare violations of the Act, Commission rules or orders, and to impose injunctive relief. The staff will address such requests as appropriate on a case-by-case basis. We decline, however, to impose one commenter's suggested requirement that the Commission rule on such requests within seven days of the filing of an answer.²³⁵

VIII. Other Issues

94. The *Public Notice* also requested comment on whether it would be necessary to modify any other rules in order to accommodate the time constraints of the Accelerated Docket.²³⁶ Commenters have made several recommendations, including that we: (1) limit the effect of Accelerated Docket decisions on future cases; (2) allow compulsory counterclaims to be pursued on the Accelerated Docket; and (3) issue a formal notice of proposed rulemaking in this proceeding.

95. *Precedential Value of Accelerated Docket Proceedings*: Bell Atlantic suggests that, in light of the expedited nature of the new docket, rulings in Accelerated Docket proceedings be limited to the particular case in question and that they be accorded no preclusive or precedential effect in other proceedings or other forums.²³⁷ We decline to impose such a limit on Accelerated Docket proceedings. Rather, staff rulings on the docket will have the same precedential value as any other adjudicative decision issued under delegated authority. The swift resolution of issues under the Accelerated Docket does not diminish the importance of these decisions. As discussed above, we expect that the complete record to be compiled in Accelerated Docket proceedings will ensure carefully reasoned and fully supported decisions. Such decisions will serve as valuable precedent to parties negotiating or litigating similar conflicts in the future.

96. *Counterclaims*: CompTel suggests that counterclaims be permitted in Accelerated Docket proceedings if they arise from the same transaction or occurrence, and

²³⁴ *First Report and Order*, 12 FCC Rcd at 22565, ¶ 159. See also *General Telephone Co. v. FCC*, 413 F.2d 390 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969).

²³⁵ See CompTel Comments at 8.

²³⁶ *Public Notice* at 6, ¶ 8.

²³⁷ See Bell Atlantic Comments at 8.

would be eligible for the Accelerated Docket if brought separately.²³⁸ In the *First Report & Order*, we prohibited all counterclaims in complaint proceedings, requiring that such claims be filed as separate, independent actions.²³⁹ We took this action to ensure that complaint proceedings would be resolved within the statutory deadlines in the 1996 Act.²⁴⁰ This reasoning applies with even greater force to the Accelerated Docket proceedings, which we expect to be resolved even more quickly than required by the statutory deadlines. Defendants will be required to file any counterclaims that they may have as separate actions for which they will be required independently to seek inclusion on the Accelerated Docket.

97. *Need for Formal Notice of Proposed Rulemaking.* BellSouth contends that the notice provisions of the Administrative Procedure Act ("APA") require that, before issuing rules to govern the Accelerated Docket, we must issue a formal notice of proposed rulemaking, including specific proposed rules.²⁴¹ We disagree. Section 553(b) of the APA requires that an agency afford interested parties adequate notice of, and an opportunity to comment on, the provisions that appear in the agency's final regulations.²⁴² Courts have interpreted this to require that an agency provide "sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully."²⁴³ The *Public Notice* appeared in the Federal Register, and it contained adequate notice of the provisions we adopt today. Accordingly, we believe that no further notice is required to comply with the notice provisions of the APA.

IX. Review by the Commission

98. The 1996 Act imposes a five-month deadline on the Commission's resolution of certain categories of complaint proceedings, and it requires that they be decided by order of the Commission itself, rather than under delegated authority.²⁴⁴ To comply with this statutory

²³⁸ See CompTel Comments at 8.

²³⁹ See *First Report & Order*, 12 FCC Rcd at 22588, ¶ 217.

²⁴⁰ See *id.*

²⁴¹ See BellSouth Comments at 2 & n.4.

²⁴² 5 U.S.C. § 553.

²⁴³ *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1045 (1989).

²⁴⁴ See 47 U.S.C. §§ 155(c)(1), 208(b)(1). See also *First Report & Order* 12 FCC Rcd at 22512-13, ¶¶ 34-37 (discussing categories of complaints to which shorter deadlines apply).

deadline when it arises in cases on the Accelerated Docket, the *Public Notice* proposed that all briefing on any challenge to a staff decision on the new docket be completed between 20 and 30 days after the decision's release.²⁴⁵ It also proposed the possibility of *en banc* oral argument before the Commission for some Accelerated Docket proceedings in which the Commission decides not to adopt summarily the staff's decision.²⁴⁶

99. Commenters support the proposal concerning the briefing schedule for Commission review of final staff rulings on the Accelerated Docket.²⁴⁷ Commenters also support the idea of having *en banc* oral argument in some cases when the Commission does not summarily affirm or adopt the staff decision.²⁴⁸ In order to comply with the five-month statutory deadline when it is applicable and, more generally, to ensure prompt Commission action on proceedings on the new docket, we adopt the following schedule and procedures for challenges to final staff decisions in Accelerated Docket proceedings.

100. Certain categories of issues that arise in Accelerated Docket proceedings will properly be the subject of delegated authority decisions by the Bureau. These issues will be those that fall outside of section 5(c)(1) of the Act²⁴⁹ and that do not raise novel issues of law or policy.²⁵⁰ Such staff decisions issued on delegated authority after the minitrial will be, pursuant to our rules, immediately effective and binding on the parties.²⁵¹ A party to the proceeding that seeks to challenge such a decision may do so by filing its application for review. Applications for review of Accelerated Docket staff decisions based on delegated authority will be due 15 calendar days after the release date of the staff decision.²⁵² As under our current rules, the opposition to the application for review will be due 15 calendar days

²⁴⁵ See *Public Notice* at 6, ¶ 9.

²⁴⁶ *Id.*

²⁴⁷ See, e.g., Ameritech Comments at 36; Cincinnati Bell Comments at 9; MCI Comments at 12.

²⁴⁸ See, e.g., Ameritech Comments at 36; ICG Comments at 8-9.

²⁴⁹ See 47 U.S.C. §§ 155(c)(1), 208(b)(1). See also *First Report & Order* 12 FCC Rcd at 22512-13, ¶¶ 34-37 (discussing categories of complaints to which shorter deadlines apply).

²⁵⁰ Cf. 47 C.F.R. § 0.291(d).

²⁵¹ See 47 C.F.R. § 1.102(b).

²⁵² See Appendix Rule 1.115(e)(4).

after the application for review is filed,²⁵³ and the party seeking review may file its reply 10 calendar days after the due date of the opposition.²⁵⁴

101. Alternatively, certain other Accelerated Docket proceedings will raise issues that may not be decided on delegated authority. Thus, the Act requires that certain questions be the subject of Commission orders.²⁵⁵ Similarly, our delegation rules reserve to the Commission novel questions of law or policy.²⁵⁶ Accordingly, in proceedings raising issues that the Commission must decide, the staff decision, issued after the minitrial, will not be immediately effective. Rather, such decisions will be recommended decisions, which the Commission will either adopt or modify.²⁵⁷ A party to the proceeding that seeks to challenge the staff decision before the Commission may do so by filing its comments on the recommended decision according to the same schedule as that applicable for applications for review on the Accelerated Docket.²⁵⁸ Opposition and reply comments similarly are permitted on the same schedule as that for applications for review.

102. In the event that neither party files comments to challenge a recommended staff decision in an Accelerated Docket proceeding, the Commission will issue its order either adopting or modifying the staff decision within forty-five days of its release.²⁵⁹ If the staff's recommended decision is challenged by any party to the proceeding, the Commission will issue its order either adopting or modifying the decision no more than thirty days after the filing of the final comments on the decision.²⁶⁰

²⁵³ See 47 C.F.R. § 1.115(d).

²⁵⁴ See *id.*

²⁵⁵ See 47 U.S.C. § 155(c)(1).

²⁵⁶ See 47 C.F.R. § 0.291(d).

²⁵⁷ See Appendix, Rule 1.730(h).

²⁵⁸ See *id.*

²⁵⁹ See Appendix, Rule 1.730(i).

²⁶⁰ See *id.*

103. The Commission may summarily affirm a staff decision from the Accelerated Docket before it for review. Additionally, in cases where it appears that argument would aid in our decision, we may schedule an oral argument before the full Commission.²⁶¹

104. We are not persuaded by Cincinnati Bell's argument that the *en banc* hearing procedure proposed in the *Public Notice* somehow would prejudice one of the parties to the complaint proceeding.²⁶² The *en banc* argument of petitions for review merely would give the Commission the opportunity to clarify issues that may remain unclear after the parties' briefs on the petition for review. That this argument may take place after the Commission has decided not to summarily affirm the staff decision can hardly be said to disadvantage either party. Federal courts, including the Supreme Court, regularly decide whether they will hear argument in matters before them, without prejudicing any party. The procedure we adopt today will have no different effect.

X. Conclusion

105. In this *Second Report & Order*, we amend our rules governing formal complaint proceedings to create an Accelerated Docket, which will be administered by the Enforcement Division of the Common Carrier Bureau. The rules of practice and procedure relating to the Accelerated Docket will promote competition in all telecommunications markets by providing an expedited process for resolving complaints of unreasonable, discriminatory, or otherwise unlawful conduct by telecommunications carriers.

106. We recognize that many of the procedures we adopt for the Accelerated Docket are, to a substantial extent, new and untried. Accordingly, we expect that both staff and the Commission will accumulate valuable experience in the implementation of these new rules. We will monitor closely the effect and utility of the Accelerated Docket procedures; and we expect to receive periodic reports from the Common Carrier Bureau regarding its administration of the new docket. Based on this information and within a year of the effective dates of these rules, we will consider revisions to these procedures to make them more effective.²⁶³

²⁶¹ See ICG Comments at 8-9 (recommending that panel of Commissioners instead of whole Commission hearing application for review, citing 47 C.F.R. §§ 0.212, 0.218).

²⁶² See Cincinnati Bell Comments at 9.

²⁶³ If, at some future point we should determine that revisions to the rules of the Accelerated Docket are appropriate, such changes likely would fall within the Commission's broad discretion over its procedural rules. See, e.g., 47 U.S.C. § 154(j). Accordingly, we likely would implement such changes without publishing notice of them and seeking comment.

XI. Procedural Matters

A. Paperwork Reduction Act Analysis

107. The decision herein has not yet been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. 104-13. Accordingly, the information collection requirements in this item are contingent upon approval by the Office of Management and Budget ("OMB").

B. Final Regulatory Flexibility Analysis

108. As required by the Regulatory Flexibility Act ("RFA"),²⁶⁴ an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the notice of proposed rulemaking in this docket.²⁶⁵ The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Commission sought additional comment in a public notice.²⁶⁶ The Commission has prepared this Final Regulatory Flexibility Analysis of the possible significant economic impact on small entities of the rules promulgated in this *Second Report & Order*. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.²⁶⁷

²⁶⁴ See 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"), Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

²⁶⁵ See *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Notice of Proposed Rulemaking, 11 FCC Rcd 20823 (1996) (NPRM).

²⁶⁶ *Common Carrier Bureau Seeks Comment Regarding Accelerated Docket for Complaint Proceedings*, Public Notice, CC Dkt No. 96-238, DA 97-2178 (rel. Dec. 12, 1997).

²⁶⁷ See 5 U.S.C. § 604.

1. **Need for and Objectives of the *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, Second Report and Order, and the Rules Adopted Herein**

109. The Commission is issuing this *Second Report & Order* to create an Accelerated Docket designed to provide for the prompt resolution of carrier-related disputes and to carriers to obtain more extensive discovery from their opponents than has been routinely available in formal complaint proceedings. Additionally, the new docket will provide for the full and effective presentation of each party's case in a hearing-type proceeding. Generally, the amended rules will: (1) require parties to engage in staff-supervised pre-filing settlement discussions, (2) modify the form of initial pleadings, (3) shorten filing deadlines, (4) modify the discovery process, (5) provide for the live presentation of evidence to the decision maker, and (6) require provide for expedited briefing and review of staff decisions.

2. **Summary of Significant Issues Raised by the Public Comments in Response to the IRFA**

110. The IRFA solicited comment on alternatives to our proposed rules that would minimize the impact on small entities consistent with the objectives of this proceeding. No comments were submitted directly in response to the IRFA. However, as described below in Sections 4 and 5, we have taken into account those portions of the rules that appear most likely to affect small entities.

3. **Description and Estimate of the Number of Small Entities to Which the Rules Adopted in the *Report and Order* in CC Docket No. 96-238 Will Apply**

111. The RFA generally defines small entity as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdictions."²⁶⁸ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632, unless the Commission has developed one or more definitions that are appropriate to its activities.²⁶⁹ Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and

²⁶⁸ 5 U.S.C. § 601(6).

²⁶⁹ See 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration ("SBA").²⁷⁰ Moreover, the SBA has defined a small business for Standard Industrial Classification ("SIC") categories 4812 ("Radiotelephone Communications") and 4813 ("Telephone Communications, Except Radiotelephone") to be small entities when they have no more than 1,500 employees.²⁷¹ We first discuss the estimated number of potential complainants, which may include entities that are not telephone companies. Next we discuss generally the estimated number of potential defendants, which would be included in the total number of small telephone companies falling within the SBA definitions of small business concerns and small businesses. Then, we discuss the number of small businesses within the SIC subcategories, and attempt further to refine those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

112. Consistent with our prior practice, we shall continue to exclude small incumbent LECs from the definition of "small entity" and "small business concerns" for the purpose of this FRFA. We do this because the small incumbent LECs subject to these rules are either dominant in their field of operations or are not independently owned and operated,²⁷² and they thus are excluded from the definition of "small entity" and "small business concerns." Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this analysis and use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."²⁷³

a. Potential Complainants

113. Section 208(a) provides that formal complaints against a common carrier may be filed by "[a]ny person, any body politic or municipal organization."²⁷⁴ Beyond this definition, the FCC has no control or information regarding the filing frequency of complaints, nor identities of parties that will file complaints. The filing of complaints depends entirely upon the complainant's perception that it has a cause of action against a common carrier subject to the Act, as amended, and it is the complainant's decision to file its

²⁷⁰ 15 U.S.C. § 632.

²⁷¹ 13 C.F.R. § 121.201.

²⁷² *Local Competition First Report and Order* at paras. 1328-30, 1342.

²⁷³ *Id.*

²⁷⁴ 47 U.S.C. § 208(a).

complaint with the FCC. Therefore we are unable at this time to estimate the number of future complainants that would qualify as small business concerns under the SBA's definition.

114. As noted, the RFA includes "small businesses," "small organizations" (non-profits), and "small governmental jurisdictions." Nationwide, there are 4.44 million small business firms, according to SBA reporting data.²⁷⁵ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."²⁷⁶ Nationwide, there are 275,801 small organizations.²⁷⁷ Last, "small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."²⁷⁸ As of 1992, there were 85,006 such jurisdictions in the United States.²⁷⁹

b. Potential Defendants

115. *Estimate of Potential Defendants that may be Classified as Small Businesses.* Section 208(a) provides for the filing of formal complaints for "anything done or omitted to be done by any common carrier subject to this Act."²⁸⁰ The FCC has no control as to the filing frequency of complaints because such filing depends entirely upon the complainant's perception that it has a cause of action against a common carrier subject to the Act, as amended, and it is the complainant's decision to file its complaint with the FCC. This inability to predict the number of future defendants necessitates conducting this FRFA based on the number of potential small business defendants, which is the number of common carriers that qualify as small business concerns under the SBA's definition. Additionally, we note that these rules initially will be applied only to certain complaints handled by the Common Carrier Bureau; however, as we gain more experience with that bureau's application of these rules, we may extend them to certain complaints handled by the Wireless

²⁷⁵ 1992 Economic Census, U.S. Bureau of the Census, Table 6, (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

²⁷⁶ 5 U.S.C. § 601(4).

²⁷⁷ 1992 Economic Census, U.S. Bureau of the Census, Table 6, (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

²⁷⁸ 5 U.S.C. § 601(5).

²⁷⁹ US Department of Commerce, Bureau of the Census, "1992 Census of Governments."

²⁸⁰ 47 U.S.C. § 208(a).

Telecommunications Bureau.²⁸¹ Accordingly, we have included certain wireless carriers in the discussion below.

116. The most reliable source of information regarding the total numbers of certain common carriers nationwide appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS).²⁸² According to data in the most recent report, there are 3,459 interstate carriers.²⁸³ These carriers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone toll service, providers of telephone exchange service, and resellers.²⁸⁴

117. *Total Number of Telephone Companies Affected.* The decisions and rules adopted herein may have a significant effect on a substantial number of small telephone companies identified by the SBA. The United States Bureau of the Census ("Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone service, as defined therein, for at least one year.²⁸⁵ This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."²⁸⁶ For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that no more than 3,497 telephone service firms are

²⁸¹ See *supra* n.9.

²⁸² FCC, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997) (*Telecommunications Industry Revenue*).

²⁸³ *Id.*

²⁸⁴ See 13 CFR § 121.201, SIC code 4813.

²⁸⁵ United States Department of Census, Bureau of the Census, 1992 *Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) ("1992 Census").

²⁸⁶ 15 U.S.C. § 632(a)(1).

small entity telephone service firms or small incumbent LECs that may be affected by this Order. We estimate below the potential defendants affected by this order by service category.

118. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telecommunications companies other than radiotelephone (wireless) companies (Telephone Communications, Except Radiotelephone). The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.²⁸⁷ According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.²⁸⁸ Of the 2,321 non-radiotelephone companies listed by the Census Bureau, 2,295 companies (or, all but twenty-six) were reported to have no more than 1,000 employees. Thus, at least 2,295 non-radiotelephone companies might qualify as small incumbent LECs or small entities based on these employment statistics. However, because it seems certain that some of these carriers are not independently owned and operated, this figure necessarily overstates the actual number of non-radiotelephone companies that would qualify as "small business concerns" under the SBA definition. Consequently, we estimate using this methodology that there are no more than 2,295 small entity telephone communications companies (other than radiotelephone companies) that may be affected by the actions taken in this *Report and Order*.

119. *Non-LEC wireline carriers.* We next estimate more precisely the number of non-LEC wireline carriers, including interexchange carriers ("IXCs"), competitive access providers ("CAPs"), Operator Service Providers ("OSPs"), Pay Telephone Operators, and resellers that may be affected by these rules. Because neither the Commission nor the SBA has developed definitions for small entities specifically applicable to these wireline service types, the closest applicable definition under the SBA rules for all these service types is for telephone communications companies other than radiotelephone (wireless) companies. However, the TRS data provides an alternative source of information regarding the number of IXCs, CAPs, OSPs, Pay Telephone Operators, and resellers nationwide. According to our most recent data: 143 companies reported that they are engaged in the provision of interexchange services; 109 companies reported that they are engaged in the provision of competitive access services; twenty-seven companies reported that they are engaged in the provision of operator services; 441 companies reported that they are engaged in the provision of pay telephone services; and 339 companies reported that they are engaged in the resale of telephone services and thirty-eight reported being "other" toll carriers.²⁸⁹ Although it seems certain that some of these carriers are not independently owned and operated, or have more

²⁸⁷ 1992 Census, *supra*, at Firm Size 1-123.

²⁸⁸ 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4813.

²⁸⁹ *Telecommunications Industry Revenue*, Figure 2.

than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXC's, CAP's, OSP's, Pay Telephone Operators, resellers and other toll carriers that would qualify as small business concerns under SBA's definition. Firms filing *TRS Worksheets* are asked to select a single category that best describes their operation. As a result, some long distance carriers describe themselves as resellers, some as OSP's, some as "other," and some simply as IXC's. Consequently, we estimate that there are no more than 130 small entity IXC's; fifty-seven small entity CAP's; twenty-five small entity OSP's; 271 small entity pay telephone service providers; and 260 small entity providers of resale telephone service; and thirty "other" toll carriers that might be affected by the actions and rules adopted in this *Report and Order*.

120. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a definition for small providers of local exchange services ("LECs"). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.²⁹⁰ According to the most recent *Telecommunications Industry Revenue* data, 1,371 carriers reported that they were engaged in the provision of local exchange services.²⁹¹ We do not have data specifying the number of these carriers that are either dominant in their field of operations, are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 1,371 providers of local exchange service are small entities or small ILECs that may be affected by the rules adopted in this *Report and Order*.

121. *Radiotelephone (Wireless) Carriers.* The SBA has developed a definition of small entities for Wireless (Radiotelephone) Carriers. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.²⁹² According to the SBA's definition, a small business radiotelephone company is one employing no more than 1,500 persons.²⁹³ The Census Bureau also reported that 1,164 of those radiotelephone companies had no more than 1,000 employees. Thus, even if all of the remaining twelve companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although it seems certain that some of these carriers are not independently

²⁹⁰ *Id.*

²⁹¹ *Telecommunications Industry Revenue*, Figure 2.

²⁹² *1992 Census, supra*, at Firm Size 1-123.

²⁹³ 13 C.F.R. § 121.201 (SIC Code 4812).

owned and operated, and, we are unable to estimate with greater precision the number of radiotelephone carriers and service providers that would both qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are no more than 1,164 small entity radiotelephone companies that might be affected by the actions and rules adopted in this *Report and Order*.

122. *Cellular and Mobile Service Carriers.* Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies. This provides that a small entity is a radiotelephone company employing no more than 1,500 persons.²⁹⁴ According to the Bureau of the Census, only twelve radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.²⁹⁵ Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. In addition, we note that there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. In addition, according to the most recent *Telecommunications Industry Revenue* data, 804 carriers reported that they were engaged in the provision of either cellular service or Personal Communications Service ("PCS") services, which are placed together in the data.²⁹⁶ We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 804 small cellular service carriers that might be affected by the actions and rules adopted in this *Report and Order*.

123. *Mobile Service Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. The closest applicable definition under the SBA rules is that for radiotelephone (wireless) companies,²⁹⁷ and the most recent *Telecommunications Industry Revenue* data shows that 172 carriers reported that they were engaged in the provision of either paging or "other

²⁹⁴ 13 C.F.R. § 121.201, SIC code 4812.

²⁹⁵ 1992 Census, Series UC92-S-1, at Table 5, SIC code 4812.

²⁹⁶ *Telecommunications Industry Revenue*, Figure 2.

²⁹⁷ 13 C.F.R. § 121.201, SIC code 4812.

mobile" services.²⁹⁸ Consequently, we estimate that there are fewer than 172 small mobile service carriers that might be affected by the rules adopted in this *Report & Order*.

124. *Broadband PCS Licensees.* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.²⁹⁹ For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.³⁰⁰ These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.³⁰¹ No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F.³⁰² Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small entity PCS providers as defined by the SBA and the Commission's auction rules.

4. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

125. Below, we analyze the projected reporting, recordkeeping, and other compliance requirements that may apply to small entities and small incumbent LECs, and we mention some of the skills needed to meet these new requirements. Overall, we anticipate

²⁹⁸ *Telecommunications Industry Revenue*, Figure 2.

²⁹⁹ See *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order*, FCC 96-278, WT Docket No. 96-59, ¶¶ 57- 60 (released June 24, 1996), 61 FR 33859 (July 1, 1996); see also 47 C.F.R. § 24.720(b).

³⁰⁰ See *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order*, FCC 96-278, WT Docket No. 96-59, ¶ 60 (1996), 61 Fed. Reg. 33859 (July 1, 1996).

³⁰¹ See, e.g., *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

³⁰² FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (released January 14, 1997).

that the impact of these rules will be beneficial to small businesses and other filers. By requiring supervised pre-filing settlement discussions, and offering a faster alternative for the resolution of competitive disputes, these rules will assist in the settlement of disputes without litigation, and they will result in the speedier disposition of complaints that are actually filed. Moreover, Commission staff retains the discretion to refuse to accept a complaint proceeding onto the Accelerated Docket if it appears that such acceptance would place an inordinately high burden on one party, including small business entities.

126. *Supervised Settlement Discussions.* The amended rules will require a prospective complainant to notify Commission staff of its intention to file a complaint and then to participate in staff-supervised, pre-filing settlement discussions before its complaint, once filed, will be accepted onto the Accelerated Docket.³⁰³ Similarly, the amended rules require a defendant seeking admission to the Accelerated Docket to submit its written request to the staff and then to participate in any supervised settlement discussions that the staff deems appropriate.³⁰⁴ Although these supervised negotiation requirements may delay slightly a complainant's filing of a formal complaint or the progress of a proceeding in which a complaint has already been filed, we conclude that these requirements will serve to settle or narrow disputes, or to facilitate the compilation and exchange of relevant documentation or other information prior to the filing of a formal complaint with the Commission.

127. *Pleadings and Discovery.* The amended rules require complaints and answers to be accompanied by copies of all documents within the filing party's possession, custody or control which are likely to bear significantly on any claim or defense in the proceeding.³⁰⁵ The defendant must file its answer within ten days after service of the complaint.³⁰⁶ No separate reply pleading shall be permitted, but complainants that would otherwise file a reply may include that material in their pre-status-conference filing.³⁰⁷ In addition to the automatic document production that will accompany both parties' initial pleadings, parties may include in their pre-status-conference filings, requests for additional discovery, including requests for depositions, interrogatories or additional document production.³⁰⁸

³⁰³ See Appendix, Rule 1.730(b).

³⁰⁴ See Appendix, Rule 1.730(c).

³⁰⁵ See Appendix, Rules 1.721(e)(1) and (2).

³⁰⁶ See Appendix, Rule 1.724(k)(1).

³⁰⁷ See Appendix, Rule 1.733(i)(4).

³⁰⁸ See Appendix, Rule 1.729(i)(2).

128. *Status Conferences.* An initial status conference will take place ten calendar days after the filing of the answer unless otherwise ordered by the staff.³⁰⁹ Before this status conference, the parties shall have conferred regarding: (1) discovery; (2) issues in dispute; (3) facts to which they can stipulate; (4) factual and legal issues in dispute.³¹⁰ The parties shall submit, two days before the initial status conference, a joint statement of stipulated facts and, if possible, joint statements regarding agreed discovery and disputed issues.³¹¹ Where opposing parties cannot agree on discovery issues or on a joint statement of disputed issues, each party shall submit, two days before the status conference, a separate statement on these issues.³¹²

129. These amended rules may place a greater burden on parties, including small business entities, to file their answers and provide copies of discoverable documents to their opponents within a short period of time. However, in many other respects, the rules pleading, discovery and status conference rules under the Accelerated Docket are significantly less burdensome than under the rules applicable more generally to formal complaint proceedings. For example, it will be substantially less burdensome for defendant simply to provide copies of the appropriate documents to their opponents than it will be to compile the document inventory required in other formal complaint proceedings. Additionally, in light of the substantial time that it may take to negotiate joint statements of disputed issues, parties on the Accelerated Docket are permitted to submit separate statements containing this information. These rules will enable the Commission to resolve many preliminary issues efficiently at the initial status conference and thereby prevent the parties from wasting resources through delay. Furthermore, the rules will enable the parties quickly to receive substantial discovery through an automatic document production. This should substantially speed parties' preparation of their cases.

130. *Minitrials and Petitions for Review.* Between forty and forty-five days after a complaint is filed in an Accelerated Docket proceeding, the parties will participate in a minitrial proceeding at which they will present their case through live testimony and/or argument of counsel. Parties will be required to file proposed findings of fact and conclusions of law two days before the minitrial; rebuttal proposed findings of fact and conclusions of law may be filed three days after the conclusion of the minitrial. Once the staff has issued a decision or a recommended decision, any application for review by the

³⁰⁹ See Appendix, Rule 1.733(i)(1).

³¹⁰ See Appendix, Rule 1.733(i)(2).

³¹¹ See Appendix, Rule 1.733(i)(3).

³¹² See Appendix, Rule 1.733(i)(3).

Commission or other challenge to the Bureau decision will be due fifteen days after the release of the decision. Oppositions will be due fifteen days after the application or other challenge is filed; and replies will be due ten days thereafter.

131. These amended rules may place a burden on parties, including small business entities, to prepare the required proposed findings of fact and conclusions of law and to prepare and present their cases at the minitrial. However, this burden will be offset by a corresponding reduction in the work that the parties would have been required to expend preparing briefs under the generally applicable formal complaint rules. Additionally, the compressed briefing deadlines will impose some additional burden on parties challenging staff decisions. These rules will permit parties to present their cases directly to the Commission staff and to respond immediately to questions or concerns that the staff may have. Furthermore, the compressed briefing schedule for applications for review will ensure that the review process for Accelerated Docket proceedings progresses quickly, thereby affording the parties a decision by the full Commission in as short a time as possible.

132. As noted above, Commission staff retains the discretion to decline to admit a formal complaint proceeding to the Accelerated Docket where it appears that such admission would place an unreasonable burden on a party to the proceeding, including a small business entity. It is also important to note that these rules apply only to section 208 complaints that are filed with the Commission. Complainants wishing to participate in a less accelerated process, for example, may file their complaints in federal district court.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

133. These amended rules may place a greater burden on a small business entity to provide greater discovery early in the process and to litigate their cases more quickly than in the past. However, we conclude that the rules do not significantly alter the level of evidentiary and legal support that would be ultimately required of parties in formal complaint actions pursuant to the past rules. Additionally, potentially higher initial costs may be somewhat offset by the prompt resolution of complaints and the avoidance of protracted and costly discovery proceedings and briefing requirements. It has been noted, for example, that the overall litigation costs of "rocket docket" cases in the U.S. District Court for the Eastern District of Virginia are lower than the costs of cases that take longer to resolve.³¹³ Indeed, by requiring better and more complete submissions earlier in the process, these amended rules

³¹³ In rocket docket cases, the total litigation costs may be lower than in traditional federal litigation. Furthermore, because a preliminary injunction and damages judgment can be obtained so quickly, a complainant's market share can be preserved. George F. Pappas and Robert G. Sterne, *Patent Litigation in the Eastern District of Virginia*, 35 IDEA: J.L. & Tech. 361, 363 (1995).

reduce the need for discovery and other information filings, thereby significantly reducing the burden on small business entities.

134. Overall, we conclude that there will be a significant positive economic impact on small entity carriers that, as a result of the new Accelerated Docket, will find their complaints resolved more expeditiously than in the past. The establishment of these rules of practice and procedure, by providing a forum for prompt resolution of complaints of unreasonable, discriminatory, or otherwise unlawful conduct by BOCs and other telecommunications carriers, will foster robust competition in all telecommunications markets.

6. Report to Congress

135. The Commission will send a copy of the *Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, Second Report & Order, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. § 801 (a)(1)(A). A summary of this *Report and Order* and this FRFA will also be published in the Federal Register, see 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

XII. Ordering Clauses

136. Accordingly, IT IS ORDERED that pursuant to sections 1, 4, 201-205, 208, 260, 271, 274, and 275 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 208, 260, 271, 274, and 275, the policies, rules, and requirements set forth herein ARE ADOPTED.

137. IT IS FURTHER ORDERED that 47 C.F.R. Part 1 IS AMENDED as set forth in the Appendix, effective thirty days after publication of the text thereof in the Federal Register.

138. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Second Report & Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

139. The *Second Report & Order* IS ADOPTED, and the requirements contained herein will become effective 60 days after publication of a summary in the Federal Register. The collection of information contained within is contingent upon approval by OMB. Notice of that approval will be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

APPENDIX

AMENDMENT OF FORMAL COMPLAINT RULES AND PROCEDURES
CC DOCKET NO. 96-238

TEXT OF RULE CHANGES

PART 1 – PRACTICE AND PROCEDURE

140. Section 1.115 is amended by adding subparagraph (e)(4) to read as follows:

Section 1.115 Application for review of action taken pursuant to delegated authority.

* * * * *

(e) * * *

(4) Applications for review of final staff decisions issued on delegated authority in formal complaint proceedings on the Common Carrier Bureau's Accelerated Docket (see, e.g., § 1.730) shall be filed within 15 days of public notice of the decision, as that date is defined in section 1.4(b). These applications for review, oppositions and replies in Accelerated Docket proceedings shall be served on parties to the proceeding by hand or facsimile transmission.

141. Section 1.720 is amended by revising the introductory paragraph as follows:

Section 1.720 General pleading requirements.

Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments. Commission proceedings may also require or permit other written submissions such as briefs, written

interrogatories, and other supplementary documents or pleadings. Those formal complaint proceedings handled on the Common Carrier Bureau's Accelerated Docket are subject to pleading and procedural rules that differ in some respects from the general rules for formal complaint proceedings.

142. Section 1.721 is amended by revising the section title, paragraph (a) and subparagraph (a)(10)(ii) and by adding paragraph (e) as follows:

Section 1.721 Format and Content of Complaints.

(a) Subject to paragraph (e) of this section governing Accelerated Docket proceedings, a formal complaint shall contain:

* * * * *

(10) * * *

(ii) A description of all documents, data compilations and tangible things in the complainant's possession, custody, or control, that are relevant to the facts alleged with particularity in the complaint. Such description shall include for each document:

* * * * *

(e) Complaints on the Accelerated Docket. For the purpose of this paragraph (e), the term document also shall include data compilations and tangible things.

(1) Formal complaints that have been accepted onto the Accelerated Docket shall conform to the requirements set out in this section with the following listed exceptions:

(i) The requirement in § 1.720(c) and paragraphs (a)(5) and (a)(11) of this section that factual assertions be supported by affidavit shall not apply to complaints on the Accelerated

Docket. Nevertheless, allegations of material fact, whether based on personal knowledge or information and belief, that cannot be supported by documentation remain subject to the provisions of § 1.52.

(ii) Complaints on the Accelerated Docket are not required to include proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the complaint, as required in paragraph (a)(6) of this section. Nevertheless, complaints on the Accelerated Docket shall fully set out the facts and legal theories on which the complainant premises its claims.

(iii) In light of the requirement for staff-supervised settlement negotiations in § 1.730(b), complaints on the Accelerated Docket are not required to include a certification that the complainant has discussed or attempted to discuss the possibility of settlement with each defendant, as required in paragraph (a)(8) of this section.

(iv) In light of the automatic document production required in § 1.729(i)(1), complaints on the Accelerated Docket are not required to include a description of all relevant documents in the complainant's possession, custody or control, as required in paragraph (a)(10)(ii) of this section.

(v) Complaints on the Accelerated Docket are not required to provide the description, required in paragraph (a)(10)(iii) of this section, of the manner in which the complainant identified persons with knowledge of, and documents relevant to, the dispute.

(2) Formal complaints that have been accepted onto the Accelerated Docket will comply with the following requirements in addition to those requirements generally applicable in formal complaint proceedings:

(i) As required in § 1.729(i)(1), complaints on the Accelerated Docket shall be accompanied, when served on defendants, by copies of documents, within the complainant's possession, custody or control, that are likely to bear significantly on the issues raised in the complaint. Unless otherwise directed, these documents shall not be filed with the Commission.

(ii) Complaints on the Accelerated Docket will bear the following notation in bold typeface above the normal caption on the first page: "Accelerated Docket Proceeding: Answer Due Within Ten Days of Service Date."

143. Section 1.724 is amended by revising paragraph (a) and by adding paragraph (k) as follows:

Section 1.724 Answers.

(a) Subject to paragraph (k) of this section governing Accelerated Docket proceedings, any carrier upon which a copy of a formal complaint is served shall answer such complaint in the manner prescribed under this section within twenty days of service of the formal complaint by the complainant, unless otherwise directed by the Commission.

* * * * *

(k) Accelerated Docket Proceedings. For the purpose of this paragraph (k), the term document also shall include data compilations and tangible things.

(1) Any party named as a defendant in an Accelerated Docket formal complaint shall answer such complaint in the manner prescribed under this section within ten days of service of the complaint by the complainant, unless otherwise directed by the Commission. Except as set forth in this paragraph (k), answers in Accelerated Docket proceedings shall comply with the requirements of this section.

(2) The requirement in § 1.720(c) and paragraph (g) of this section that factual assertions be supported by affidavit shall not apply to answers in Accelerated Docket proceedings. Nevertheless, allegations of material fact, whether based on personal knowledge or information and belief, that cannot be supported by documentation remain subject to the provisions of § 1.52.

(3) Answers on the Accelerated Docket are not required to include proposed findings of fact, conclusions of law, and legal analysis relevant to the defenses and arguments set forth in the answer, as required in paragraph (c) of this section. Nevertheless, answers on the Accelerated Docket shall fully set out the facts and legal theories on which the defendant premises its defenses.

(4) In light of the requirement for staff-supervised settlement negotiations required in § 1.730(b), answers on the Accelerated Docket are not required to include a certification that the defendant has discussed, or attempted to discuss, the possibility of settlement with the complainant, as required in paragraph (h) of this section.

(5) As required in § 1.729(i)(1), answers on the Accelerated Docket shall be accompanied, when served on complainants, by copies of documents, within the defendant's